# OBSERVATIONS ON ARTICLE 11.32 OF THE DRAFT GUIDANCE ON TECHNOLOGY TRANSFER AGREEMENTS RELATING TO POST-IP EXPIRY ROYALTIES

1. Paragraph 11.32 of the Draft Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to Technology Transfer Agreements (hereinafter: "draft TT Guidance") addresses the issue of post-IP expiry royalty payment obligations. This paragraph mirrors paragraph 208 of the 2026 Guidelines on the application of Article 101 TFEU to technology transfer agreements (hereinafter: "EU TT Guidelines"), except for the reference to agreements "*where the licensee is free to terminate the agreement*". A similar reference was included in paragraph 205 of the 2025 draft EU TT Guidelines, but it was deleted in the 2026 final version of the EU TT Guidelines (at paragraph 208). I respectfully suggest that the CMA do likewise.

2. In my personal contribution to the public consultation on the draft EU revised Technology Transfer Block Exemption Regulation and Technology Transfer Guidelines (hereinafter: "EU public consultation"),[1] I had pointed out that it would be wrong to single out a right of free termination by a licensee as a contractual arrangement which, by its nature, would make a post-IP expiry royalty payment obligation more likely not to restrict competition.

3. The fact that such a contractual arrangement happened to feature in the two cases in which the EU Court of Justice addressed the issue of royalty obligations, namely *Ottung*[2] and *Genentech*[3] (in which there was also a free termination right by the licensor), should not obscure the fact that this is just one particular modality of royalty obligations among many others which parties may validly choose.

4. There are many possible legitimate reasons why parties to a licensing agreement may provide for post-IP expiry royalty payments. Spreading the payment over a longer period, to reduce the licensee's up-front costs and thereby facilitate its market entry, may be one of them. Another might be the joint intention of the parties to make royalty payments start when the product obtained through the licensed technology reaches the market and generates revenues, which may take a long time and thus result in royalty payments becoming due after the period of validity of the relevant IP rights. This is particularly common in the pharmaceutical and biotechnology sectors, where the lengthy interval between the initial innovation (and the grant of the related patents) and its successful commercial exploitation often leaves only a short period of effective patent protection during the product's commercial life. Post-expiry royalty arrangements may therefore serve to address this timing mismatch.

5. As a rule, post-IP expiry royalty payment obligations do not restrict competition. In my contribution to the EU public consultation, I briefly summarised the long history of the

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1 A copy of my contribution to the EU public consultation can be downloaded on the website of the EU Commission: https://competition-policy.ec.europa.eu/public-consultations/2025-technology-transfer_en#contributions.

2 Case 320/87, *Ottung v Klee*, Judgment of 12 May 1989.

3 Case C-567/14, *Genentech*, Judgment of 7 July 2016.

treatment of such obligations under EU competition law from the 1970s – during which they were viewed as an impermissible restriction of competition – to the late 1980s and 1990s – during which the EU Commission finally accepted that royalty payment obligations should instead be governed by the principle of contractual freedom[4].

6. This principle was affirmed in the 2004 (at paragraph 159) and 2014 (at paragraph 187) versions of the EU TT Guidelines, which recognised that "*agreements which contain royalty obligations that extend beyond the period of validity of the licensed technology right do not* ["*normally*" (2004 version) or "*necessarily*" (2014 version)] *restrict competition*".

7. In the 2025 draft TT Guidelines, the EU Commission added the comment that this is particularly the case "*where the licensee can freely terminate the agreement*", referring to paragraphs 39-40 of the *Genentech* judgment of the EU Court of Justice in support of that statement. In my contribution to the EU public consultation, I recommended that the EU Commission delete that comment.

8. As I explained in an article published in E.C.L.R.[5], *Genentech* is of no relevance to *post*-IP expiry royalty obligations. That case dealt with pre-patent expiry royalties which were due by Genentech, the licensee, until it exercised its right of free termination. A US court subsequently found that the relevant patent had not been infringed (which the EU Court of Justice equated with revocation of the patent). At that point, Genentech initiated arbitration proceedings in which it argued that the payment of the royalties at issue infringed Article 101 TFEU. In finding Genentech's claim to be meritless, the Court of Justice essentially relied on the finding made by the sole arbitrator that, under the German law applicable to the agreement, the subsequent revocation of the patent had no impact on the enforceability of the royalties previously due[6]. Thus, *Genentech* does not deal with post-patent expiry royalties.

9. A factor which has largely contributed to the misreading of the *Genentech* judgment is an error in the English translation of the judgment, of which the French version is the only authentic text.[7] This error, which affects one important word of the operative part of the judgment, suggests that a contractual right of termination by the licensee is a condition for the agreement not to fall foul of Article 101 TFEU[8]. But, when the judgment is read in its

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4 *See*, the 1988 submissions of the EU Commission to the EU Court of Justice in *Ottung*: "*Article 85 paragraph 1 of the EEC Treaty must be interpreted as meaning that a clause in a licence contract by which the parties agree that the licensee will pay to the licensor a royalty calculated on the basis of turnover as remuneration for the right to exploit the invention, beyond the expiry date of the patent granted by the licence contract and for as long as the contract remains in force, does not constitute a restriction of competition within the meaning of that Article*" (Unofficial English translation of written observations of the EU Commission in Case 320/87 *Ottung v Klee*, para 19).

5 See J-F Bellis, "*Post-patent expiry royalties and EU competition law: an old issue in need of a refresher following the CJEU Genentech judgment*", E.C.L.R. 2024, 45 (11), pp. 481-492.

6 Case C-567/14, *Genentech*, Judgment of 7 July 2016, para 42.

7 Apart from being the working language of the EU Court of Justice, French is the language in which the *Genentech* judgment was issued as the case results from a preliminary reference request by a French court.

8 The original French version of the phrase at issue reads as follows: "*dès lors que le licencié a pu librement résilier ledit accord moyennant un préavis raisonnable*". The words "*dès lors que*", which should have been translated as meaning "*since*", were instead translated as meaning "*provided that*". This resulted in the

authentic French version, what appears as a condition in the English version is in fact nothing more than a description of a contractual feature of the licensing agreement at issue to which no normative value should be attributed.

10. The confusion surrounding the *Genentech* judgment has contributed to giving the right of free termination by the licensee an importance which it does not deserve. In my contribution to the EU public consultation, I expressed the concern that the comment about a licensee's termination right in the EU TT Guidelines might be a source of uncertainty that could be exploited by unscrupulous licensees seeking to evade their contractual royalty payment obligations. This uncertainty might also lead licensors to refuse to agree to pro-competitive royalty structures allowing licensees to spread payments and risk over longer periods, thereby reducing the up-front costs and risks that may represent a barrier to innovation and the use of the underlying technology.

11. For all those reasons, I suggest that the reference to a right of free termination in the last sentence of paragraph 11.32 of the draft TT Guidance be deleted. The sentence would then read as follows: "*Such arrangements serve, for example, to allow the royalty burden to be spread over a longer period*".

12. The fact that the EU Commission itself ultimately deleted this very reference from the final EU TT Guidelines lends additional weight to the recommendation that the CMA do likewise. Alignment between the EU and UK frameworks on this point would also benefit legal certainty for parties structuring cross-border licensing arrangements.

13. I thank the CMA for providing this opportunity to comment on the draft TT Guidance.

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English version of *Genentech* saying that the agreement in question did not infringe Article 101 TFEU "*provided that the licensee was able freely to terminate that agreement by giving reasonable notice*". The use of the past tense in that sentence ("…*was able to freely terminate*...") is inconsistent with a condition.